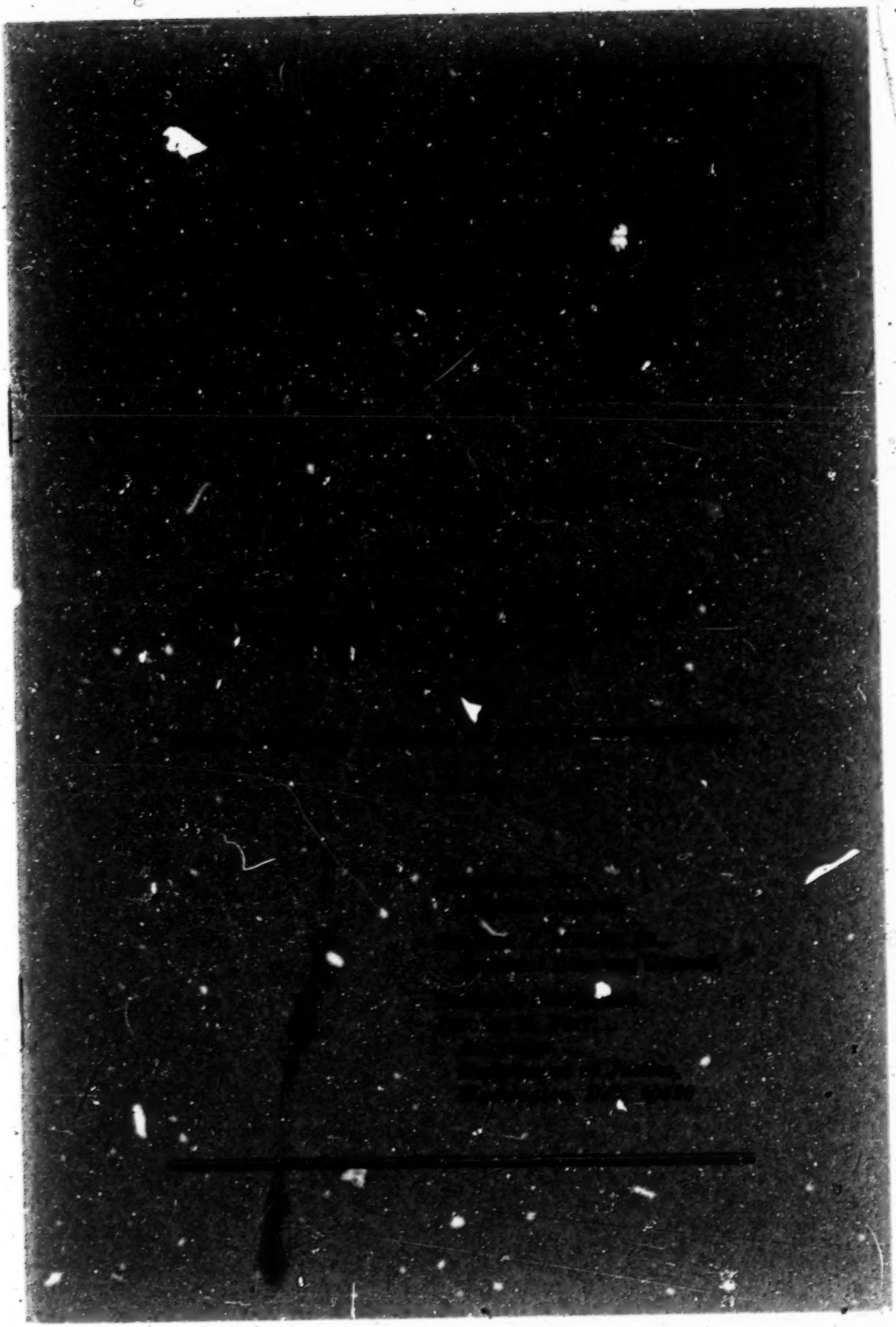

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 416

MAURICE A. HUTCHESON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (R. 30-32; Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1963 (R. 33). A petition for rehearing

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[1] "R." designates the joint appendix in the court of appeals now on file with the Clerk of this Court.

was denied on August 1, 1963 (R. 48). The petition for a writ of certiorari was filed on August 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction of the appeal from denial of petitioner's motion under Rule 12(b).

2. Whether the indictment against petitioner for contempt of Congress was so defective as to subject the conviction to attack after this Court had affirmed the conviction and had denied a petition for rehearing in which the validity of the indictment had been challenged.

3. Whether the district court abused its discretion in denying petitioner's motion to reduce sentence.

RULES INVOLVED

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides:

> * * * *
>
> (2) *Defenses and Objections Which Must be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided consti-

tutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * * *

Rule 35 of the Federal Rules of Criminal Procedure provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On May 14, 1962, this Court affirmed petitioner's conviction under 2 U.S.C. 192 (and the resulting sentence to 6 months' imprisonment and a $500 fine) for having refused to answer 18 questions put to him by the Senate Select Committee on Improper Activities in the Labor or Management Field. *Hutcheson v. United States*, 369 U.S. 599.[1] One week later

[1] The Select Committee had been empowered by the Senate to investigate criminal activities in the labor-management field (S. Res. 74, 85th Cong., 1st sess. (1957)). The subject-matter within this grant of authority under inquiry by the Committee at the time of petitioner's contumacious conduct was misuse of union funds by union officials. The pertinent

(May 21, 1962), this Court reversed 6 convictions for contempt of Congress in refusing to answer questions of a subcommittee of the House Un-American Activities Committee on the ground that the indictments failed to identify the subject-matter under inquiry by the congressional committee at the time of the contumacies charged. In each of these cases a pretrial motion to quash the indictment had been made in the district court and there denied. *Russell* v. *United States*, 369 U.S. 749.

Petitioner thereafter filed a timely petition for rehearing in this Court urging that his conviction should be reversed under *Russell* since the indictment against him similarly failed to specify the subject matter under investigation. The petition alleged that this Court was required so to act under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, *supra*, p. 2, as made applicable to this court under Rule 54(a)(1) of the Criminal Rules (Petition for Rehearing in No. 46, October Term 1961, particularly at pp. 1-3.) At the request of this Court, the government filed a response to this petition. In its memorandum the government pointed out that, while this case was like *Russell* in that the indictment did not state the subject matter under inquiry, it was significantly different from *Russell* and the companion cases in which convictions for contempt had been

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facts relating to the Committee's investigation and petitioner's appearance before it culminating in his contempt conviction are detailed in the opinion of this Court (369 U.S. at 600-607) and the Government's brief on the merits in that case (No. 46, O.T. 1961, pp. 4-23).

reversed in that petitioner had not, as had the others, filed a pre-trial motion to dismiss the indictment on such ground. The government also pointed out that the indictments in *Russell* were not held defective for failure to state an offense, but for failure sufficiently to apprise the defendant of what he must be prepared to meet, and that petitioner had never at any stage of the proceeding suggested that there was any doubt as to the subject of the committee's inquiry. This Court denied the petition for rehearing on June 25, 1962. 370 U.S. 965.

On June 25 and June 29, 1962, petitioner filed two motions in the United States District Court for the District of Columbia, one for reduction of sentence under Rule 35 of the Federal Rules of Criminal Procedure, the other under Rule 12(b)(2) to vacate the judgment and dismiss the indictment on the ground that the indictment failed to charge an offense (R. 4-6). Argument on the Rule 12(b)(2) motion took place before District Judge Curran on July 20, 1962. He denied the motion on January 10, 1963 (R. 16). District Judge Pine held a hearing on the Rule 35 motion on February 1, 1963, and denied that motion on the same date (R. 27). In overruling the motion to reduce sentence Judge Pine held that since the motion was timely filed under Rule 35, the delay in ruling thereon could not be chargeable to the defendant. The judge, however, declined to change the sentence. A notice of appeal from denial of both motions was filed on February 4, 1963 (R. 29).

In a *per curiam* opinion, the court of appeals unanimously affirmed (R. 30-32; Pet. App. A), with-

out deciding whether it had jurisdiction of the appeal from either motion (challenged by the government). It held that petitioner had shown no abuse of discretion in the denial of the motion under Rule 35. As to the motion under Rule 12(b), it held that this Court has passed on the issue when it denied the petition for rehearing.

ARGUMENT

1. While the court of appeals did not pass on its jurisdiction to hear the appeal from the denial of petitioner's motion under Rule 12(b), we submit that, if the motion is considered as under that rule, there clearly was no jurisdiction of the appeal since the notice of appeal was filed more than ten days after the denial of the motion in the criminal case. Rule 37(a)(2), F. R. Crim. P.; *United States* v. *Robinson*, 361 U.S. 220. The motion under Rule 12(b) was denied on January 10, 1963, and the notice of appeal was not filed until February 4, 1963. Petitioner, pointing out that his notice of appeal was filed within 10 days after the denial of the motion to reduce sentence, argues that his appeal from the denial of the motion under Rule 12 was timely since the motions were interrelated. But the motions are clearly discrete even though petitioner chose to file them on the same day. They sought different and inconsistent relief; obviously, if the indictment had been dismissed, there would have been no occasion to consider the motion for reduction of sentence. They were separately decided by separate judges. Under these circumstances, the entry of the order

denying the motion under Rule 12(b) marked the beginning of the time for the appeal. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, where this Court held that a subtantive change in a judgment not affecting the portion sought to be reviewed does not extend the time for review of the unchanged portion. The motions here were more clearly separate than the portions of the judgment involved in that case.

Even if the motion is treated for what it really is, a collateral attack on the judgment of conviction, the appeal is untimely. Since petitioner has not begun to serve his sentence, the motion does not lie under 28 U.S.C. 2255. If a remedy exists at all, it is either under Rule 35, on the theory that the indictment on its face will not support any sentence, or in the nature of a writ of error *coram nobis*. In either case, the motion is in the criminal case and the appeal had to be taken within 10 days after the denial of the motion. *Heflin* v. *United States*, 358 U.S. 415, 418, fn. 7; *United States* v. *Morgan*, 346 U.S. 502, 505, fn. 4.

2. In any event, all the considerations which are set forth in the government's reply to the petition for rehearing in this Court apply with even greater force to petitioner's motion raising the same issue in the district court.

The motion could not lie under Rule 12(b), not only because it was untimely under that rule, but because a district court would have no authority in the criminal proceeding to act contrary to the mandate of this Court, which had affirmed the conviction against the very contention raised in the district

court. See *Christoffel* v. *United States*, 214 F. 2d 265 (C.A. D.C.), certiorari denied, 348 U.S. 850. This Court did not leave open a motion under Rule 12 (b) in the district court. The basis of the petition for rehearing was that, by its terms, Rule 12(b) would apply in the Supreme Court if the defect was one which went to the jurisdiction of the district court. This Court, after requesting a reply from the government, declined to set aside the judgment. The denial of rehearing was therefore a ruling that the defect in the indictment was not jurisdictional and that failure to complain of it by timely pre-trial motion was fatal. See Rule 12(b), *supra*; *Hagner* v. *United States*, 285 U.S. 427, 433.

The suggestion that, even if the defect was not jurisdictional and was effectively waived, the district court retained power under the savings clause of Rule 12(b) to "grant relief from the waiver" "for cause shown," comes too late. While it is true that the petition for rehearing in this Court expressly invoked the mandatory remedy of Rule 12(b), rather than the extraordinary discretionary relief now sought; it is absurd to suggest that this Court, having focused on the claim, asked the government to respond, and considered the applicability of Rule 12(b) at petitioner's urging, took no action under the "good cause relief from waiver" portion of the rule merely because that provision was not high-

[3] The government's response noted that petitioner had "presented no cause for relief from the waiver." (Memorandum for the United States in Opposition to Petition for Rehearing, No. 46, October Term 1961, p. 3).

lighted in the application. There is no basis for petitioner's contention that this Court cannot determine the existence of sufficient cause to grant relief from the waiver, especially where the ground for excuse lies in the intervening decisions of this Court. But, even if petitioner were correct, the Court would obviously have remanded the case to the district court, rather than denied rehearing. We think it plain that this Court decided the question once and for all on the denial of the petition for rehearing.

In any event, neither here nor in the district court has petitioner shown good cause to be relieved from his waiver of the defect of the indictment. There is no showing that petitioner was prejudiced by the failure of the indictment to specify the subject matter of the congressional inquiry at the time of his contempt. His failure to object may be understandable in light of the history of the decisions. But, in the absence of resulting prejudice to the conduct of his defense, a bare showing that his attorneys failed to take advantage of a technical defect is not sufficient reason to erase the effect of the waiver. Rights are often lost if they are not exercised. Cf. *Sunal* v. *Large*, 332 U.S. 174.

3. As to the motion to reduce sentence, neither the district court nor the court of appeals held that authority was lacking to reduce sentence when the motion was timely filed, and the delay in acting within 60 days of the mandate was attributable to the court. The district court merely decided that the case did not call for reduction of sentence; that if the conviction properly withstood an attack on the indictment,

the sentence was a proper one. The court of appeals held that the district court had not abused its discretion. These rulings present no question for review by this Court. Petitioner's attack on the indictment in no way impinges on the reasonableness of the six month sentence. The district court's discretion as to sentence is not a subject for appellate review. *Bryson* v. *United States*, 265 F. 2d 9, 14 (C.A. 9), certiorari denied, 360 U.S. 919.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1963